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Supreme Court of the United States

OCTOBER TERM, 1956

No. 524

CHARLES LOUIS d'ESPINAY-DURTAL,

Petitioner,

against

JOHN WAKEFIELD HARRIS and ELIZABETH MARSHALL HARRIS, Infants, by IRVING DROUGHT HARRIS, their Guardian ad Litem; GUARANTY TRUST COMPANY OF NEW YORK, as Trustee; ANTHONY J. ROMAGNA, Guardian ad Litem of CHANTAL LOUISE MARIE FRANCOISE d'ESPINAY, Infant; THOMAS W. CORLEY, HERVE NEAU; JESUS ARRUTIA; ANNA ARRUTIA; MARGUERITE ARRIETA; THERESE ARRIETA; A. J. HITCHMAN-ILES as Executor of the Last Will and Testament of HENRIETTA FERRIS; THOMAS BYRON GILCHRIST as Ancillary Executor of the Last Will and Testament of JEAN FERRIS d'ESPINAY-DURTAL; ROBERT M. COWEN, as Ancillary Executor of JOSEPHINE GROVE,

Respondents.

BRIEF ON BEHALF OF JOHN WAKEFIELD HARRIS, ELIZABETH MARSHALL HARRIS AND ANTHONY J. ROMAGNA, AS GUARDIAN AD LITEM OF CHANTAL L. M. F. D'ESPINAY, INFANT, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

WILLIAM T. GRIFFIN,
Attorney for Respondents, John Wakefield Harris, Elizabeth Marshall Harris and Anthony J. Romagna as Guardian ad Litem of Chantal L. M. F. d'Espinay, Infant,
233 Broadway,
New York 7, N. Y.

WILLIAM T. GRIFFIN,
HERBERT BURSTEIN,
of Counsel.

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B. There is no substance in the federal question presented by Question 2. The decision of the Court of Appeals of the State of New York did not turn on the construction of a statute and there was neither a retroactive application of any statute nor a departure from any settled rule of property in violation of the Fourteenth Amendment to the Constitution of the United States. 7

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Petitioner,

against

JOHN WAKEFIELD HARRIS and ELIZABETH MARSHALL HARRIS, Infants, by IRVING DROUGHT HARRIS, their Guardian ad Litem; GUARANTY TRUST COMPANY OF NEW YORK, as Trustee; ANTHONY J. ROMAGNA, Guardian ad Litem of CHANTAL LOUISE MARIE FRANCOISE D'ESPINAY, Infant; THOMAS W. CORLEY; HERVE NEAU; JESUS URRUTIA; ANNA URRUTIA; MARGUERITE ARRIETA; THERESE ARRIETA; A. J. HITCHMAN-ILES as Executor of the Last Will and Testament of HENRIETTA FERRIS; THOMAS BYRON GILCHRIST as Ancillary Executor of the Last Will and Testament of JEAN FERRIS D'ESPINAY-DURTAL; ROBERT M. COWEN, as Ancillary Executor of JOSEPHINE GROVE,

Respondents.

Questions Presented

Question 1 was not urged in petitioner's application to the Court of Appeals for an amended remittitur and is not properly presented here. Petitioner does not claim that it was raised in the appeals prosecuted in the New York appellate courts (Petition at p. 2).

The amended remittitur of the Court of Appeals of the State of New York (Petition at p. 3) shows that the sole

question presented is whether the retroactive commutation of petitioner's annuity as of the date of his wife's death, violated his rights under the Fourteenth Amendment to the Constitution of the United States.

Statutes Involved

There is no statute involved in this cause. Petitioner's statement of Rule 30 of the Rules of Civil Practice of the State of New York is incomplete and misleading in that it omits the catchline and the reference to the title of which Rule 30 is a part and the entire first paragraph. Moreover, petitioner misquotes the paragraph printed at page 4 of his petition by substituting "such petitioner" for the correct words "such party." The text of Rule 30, correctly cited, shows that it is referable only to the administration of funds deposited into court in connection with a tender prior to suit. The annuity here involved is payable out of the principal and income of an *inter vivos* trust, which has not been deposited in any Court.

Rule 30 is part of a section of the Rules of Civil Practice embracing six rules (Rules 29-34 entitled "Tit. 5—Payment into Court"). In 1941, Rule 30 read as follows:

> "RULE 30. ADMINISTRATION OF COURT FUNDS; GROSS SUM IN LIEU OF INCOME:
>
> "When a party is entitled to the yearly interest or income of *any sum paid into court* and invested in permanent securities, he shall be charged with the expense of investing such sum and of receiving and paying over the interest or income thereof.
>
> "If such party consent to accept a gross sum in lieu of yearly interest or income for life of a sum of money paid into court for his benefit (except in case of dower which is provided for by rule two hundred and forty-three), the same shall be estimated according to the then value of an annuity at the

rate of five per centum on the principal sum, during the probable life of such person, according to the American Experience Table of Mortality.'" (Italics supplied)

After amendment in 1948 Rule 30 read, and still reads, as follows:

"RULE 30. ADMINISTRATION OF COURT FUNDS: GROSS SUM IN LIEU OF INCOME.

"When a party is entitled to the yearly interest or income of *any sum paid into court* and invested in permanent securities, he shall be charged with the expense of investing such sum and of receiving and paying over the interest or income thereof.

"If a gross sum is payable to a party in lieu of yearly interest or income for lieu of a sum of money paid into court for his benefit (except in case of dower which is provided for by rule two rundred and forty-three), such sum shall be calculated according to the then value of an annuity at the rate of four per centum on the principal sum, compounded annually during the probable life of such person, according to the American Experience Table of Mortality, together with Craig's extension thereto for ages under ten. If in any case, such tables fail to provide required data, other tables accepted by actuarial practice may be employed.[2] (Italics supplied)

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[1] CLEVENGER'S Practice Manual, 1941 annual

[2] CLEVENGER'S Practice Manual, 1957 Annual

ARGUMENT

A. The decision by the Court of Appeals of the State of New York does not raise a federal question involving the impairment of a contract under Article I, Section 10 of the United States Constitution. That Section does not apply to judicial decisions, under the circumstances presented. Moreover, no question regarding the impairment of a contract was raised in the Courts of the State of New York.

i

Petitioner claims a statutory right, as an annuitant, to installment payments rather than the commuted principal value as of the date of settlor's death (Petition at pp. 3, 11). The principal thrust of the petitioner's argument is that his rights to installment payments became vested in 1941 and the commutation of his annuity, without his consent, was expressly prohibited by Rule 30 of the Rules of Civil Practice of the State of New York (Petition at p. 11).

The plain facts are these: there was and is no statutory right involved in this case; petitioner incorrectly relies upon Rule 30 of the Rules of Civil Practice; commutation of an annuity in New York is a matter of judicial discretion and is neither restricted nor proscribed by any statute; and the Court of Appeals did not rest its decision upon Rule 30 (Petition, App. A, pp. i-iv).

Petitioner's complaint is, in fact, directed to an adverse judicial decision. There is no "law" involved.[3] Accord-

[3] Rule 30 was not relied upon by the Referee or the New York Courts as a basis of judicial power to direct commutation (R. Vol. 1, pp. 141-149; *Matter of Harris*, 276 App. Div. 900; App. A of Petition, pp. i-xv).

ingly, his reliance upon Article I, Section 10 of the Constitution of the United States is misplaced. (*Tidal Oil Co.* v. *Flanagan*, 263 U. S. 444 (1924); *Columbia R. Gas & E. Co.* v. *South Carolina*, 261 U. S. 236 (1923); *McCoy* v. *Union Elev. R. Co.*, 247 U. S. 354 (1918); *Long Sault Development Co.* v. *Call*, 242 U. S. 272 (1916); *Detroit United R. Co.* v. *Michigan*, 242 U. S. 238 (1916); *Ross* v. *Oregon*, 227 U. S. 150 (1913); *Hanford* v. *Davies*, 163 U. S. 273 (1896); *Central Land Co.* v. *Laidley*, 159 U. S. 103 (1895); *New Orleans Waterworks Co.* v. *Louisiana Sugar Ref. Co.*, 125 U. S. 18 (1888).)

Indeed, petitioner acknowledges that "the constitutional guarantee against the impairment of contracts discussed in paragraphs 1-3 above applies only to legislative action" (Petition at pp. 11-12).

ii

Moreover, there is no contract involved in this case. Petitioner's right to the annuity did not arise out of a contract either between the State of New York and the petitioner, or between the trustee and the petitioner (*Brearley School* v. *Ward*, 291 N. Y. 358, 364, 94 N. E. 1001 (1941)). Rights of succession to property, whether by will or intestacy do not create contract rights (*United States* v. *Burnison*, 339 U. S. 87 (1950); *Irving Trust Company* v. *Day*, 314 U. S. 556 (1942)). Article I, Section 10, does not apply to alleged vested rights which are not referable to an agreement. (*Crane* v. *Hahlo*, 258 U. S. 142, 145-146 (1922); *Morley* v. *Lake Shore & M.S.R. Co.*, 146 U. S. 162, 169 (1892); *Louisiana ex rel. Folsom* v. *New Orleans*, 109 U. S. 285, 288 (1883); *Charles River Bridge Co.* v. *Warren Bridge Co.*, 11 Pet. 420, 539-540 (1837); *Satterlee* v. *Matthewson*, 2 Pet. 380, 413 (1829); *Wright, The Contract Clause and the Constitution* (1938).)

iii

There is a further bar to petitioner's claim that Question 1 is properly presented to this court. The opinion of the Court of Appeals reviews the litigation and prior appeal in this case (Petition, App. A, pp. ii-iii). On the first appeal, the Appellate Division of the Supreme Court of the State of New York (*Matter of Harris*, 276 App. Div. 990, 995 (1950), held that the court "may compute and determine the commuted value of the annuity in the hands of the Trustee, pay over such capital sum * * *" and thus discharge the lien of petitioner's annuity. No appeal was taken by petitioner from that determination to the Court of Appeals of the State of New York. The Court of Appeals then affirmed the order of the Appellate Division (302 N. Y. 752, 98 N. E. 2d, 884 (1951)).[4] No appeal was taken from that determination to the Supreme Court of the United States. Petitioner is now concluded from challenging the determination, by the Court of Appeals of New York, that commutation may be ordered without petitioner's consent. As this Honorable Court pointed out in *Angel* v. *Bullington*, 330 U. S. 183, 189 (1947):

> "If a litigant chooses not to continue to assert his rights after an intermediate tribunal has decided against him, he has concluded his litigation as effectively as though he had proceeded through the highest tribunal available to him."

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[4] The record shows that petitioner failed to appeal in 1950 from the order in *Matter of Harris*, 276 App. Div. 990, which authorized commutation without his consent. The Referee noted the failure of the petitioner to appeal from the order and stated that affirmance by the Court of Appeals was a "binding adjudication on the question of the authority of the court * * * to decree commutation in the exercise of its discretion" (R. Vol. I, p. 149). Contrary to petitioner's contention (Petition at p. 9), the Referee reported that the Court had the power to commute the annuity without petitioner's consent and independent of reference to any statute (R. Vol. I, pp. 141-149).

Finally, the amended remittitur of the Court of Appeals (Petition at p. 3) makes no reference to Article I, Section 10. This Honorable Court has held that it will consider only federal questions which were necessary to the decision of the State Court or passed upon by the State Court. (*Wilson* v. *Cook*, 327 U. S. 474, 482 (1946); *New York ex rel. Cohn* v. *Graves*, 300 U. S. 308 (1937); *Keokuk & Hamilton Bridge Company* v. *People of the State of Illinois*, 175 U. S. 626 (1900); *Dewey* v. *Des Moines*, 173 U. S. 193 (1899)).

It is clear, therefore, that Question 1 is not presented and that there is not even the substance of a federal question involved in this appeal. Petitioner's disingenuous attempt to equate a right to an annuity with a contract obligation cognizable under Article I, Section 10 of the Constitution is exposed by an analysis of the opinion of the Court of Appeals of the State of New York and by the concessions which abound in the petition.

B. There is no substance in the federal question presented by Question 2. The decision of the Court of Appeals of the State of New York did not turn on the construction of a statute and there was neither a retroactive application of any statute nor a departure from any settled rule of property in violation of the Fourteenth Amendment to the Constitution of the United States.

Petitioner alleges a statutory right to annual payments of an annuity and a "present commutation" (Petition at p. 12). Elsewhere, petitioner inconsistently urges a contract right, under Rule 30 of the Rules of Civil Practice, to prevent commutation of his annuity without his consent and, consequently, the unqualified right to receive installment payments throughout his lifetime (Petition at p. 11). In substance, petitioner incorrectly states that under Rule

30 of the Rules of Civil Practice, his annuity cannot be commuted without his consent. Petitioner then compounds his error by arguing that the Court of Appeals retroactively applied an amendment to Rule 30, adopted in 1948, and, consequently, invaded his rights under the Fourteenth Amendment to the Constitution.

It has already been shown that the decision of the New York Courts did not rest upon Rule 30 or even consider it. Petitioner acknowledges this fact, but in an effort to probe the judicial mind, hypothesizes that the New York courts "must have acted under that statute" (Petition at p. 9). This is, manifestly, an erroneous guess. Rule 30 of the Rules of Civil Practice has nothing whatever to do with commutation of an annuity payable out of an *inter vivos* trust in the circumstances of this case. Rule 30 is a rule of adjective law designed to govern procedure in the courts of the State of New York. Rule 30 is restricted to the administration of funds deposited into court in connection with a tender prior to institution of suit.[5] It prescribed and prescribes a method for the payment of interest or income on moneys deposited into court. The reference to "annuity" in Rule 30 is designed only to furnish the technique or method for computing the payment to be made out of the funds deposited in court. The Fourteenth Amendment is not applicable to forms of procedure in the State courts nor does it regulate practice therein (*Holmes* v. *Conway*, 241 U. S. 624 (1916); *Louisville & N. R. Co.* v. *Schmidt*, 177 U. S. 230 (1900)).

The incontrovertible fact is that there is neither a statute nor a settled rule of substantive law which creates a vested right to receive annual installments of the annuity, rather than the commuted capital value (*Demorest* v. *City Bank Farmers Trust Co.*, 321 U. S. 36 (1944)).

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[5] § 174-a—§ 174-c of the Civil Practice Act of the State of New York (L. 1949, ch. 208).

In 1941, at the time of the settlor's death, the law of the State of New York clearly vested in the courts the discretion to commute annuities (*People's Trust Co.* v. *Flynn*, 188 N. Y. 385, 393 (1907); *Buchanan* v. *Little*, 154 N. Y. 147, 152 (1897).* There has been no change in this law since 1941 either by statute or by decision.

There was, in short, no statute or rule of law which would prevent the commutation of petitioner's annuity in 1941 or which required his consent. In 1941, the decisional law of the State of New York clearly contemplated and sanctioned the commutation of annuities. The rights which vested in petitioner at the date of settlor's death were the rights which existed under the laws of the State of New York, namely, a right to receive installment payments of the annuity or, in the discretion of the court, the commuted capital value.

While in a proper case, an annuitant might elect to take the capital sum necessary to provide an annuity (*In re Cole's Estate*, 219 N. Y. 435, 114 N. E. 785 (1916); *In re Foster's Estate*, 174 Misc. 933, 22 N.Y.S. 2d 252 (1940); *In re Oakley's Will*, 142 Misc. 1, 254 N.Y.S. 306 (1931)), the existence of such a right on the part of the annuitant does not, by inference or otherwise, foreclose the right of a State Court in a case such as the one at bar, from commuting an annuity as of the date of death of the settlor and, in so doing, to resort to mortality tables (*Ithaca Trust Co.* v. *United States*, 279 U. S. 151, 155).

The decision by the Court of Appeals in this case did not overrule or modify an earlier contrary opinion by the Courts of New York. Contrary to petitioner's contention

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* *Buchanan* v. *Little*, *supra*, was decided in 1897 and *People's Trust Co.* v. *Flynn*, *supra*, in 1907. Rule 30 has existed in substantially the same form for over 100 years (*Gilbert and Bliss*, Editorial Notes to Rule 30). Yet Rule 30 is not mentioned in either of these cases. Thus it is clear that the Court's power to commute is not dependent on statute.

(Petition at p. 14, footnote 12), the four cases cited by him did not establish a rule of substantive property law proscribing commutation of this annuity. The New York Courts, after analyzing the four cited cases, so held (Petition, App. A., pp. x-xi).

Petitioner also misreads *Kearney* v. *Cruikshank*, 117 N. Y. 95 (1889)[1] and *Matter of Toms*, 84 Misc. 312 (1914). Neither case makes any reference to commutation; nor does either case decide or even suggest whether or not the date of death may be resorted to for purpose of commutation. Finally, petitioner says (Petition at p. 9) that in *Matter of Maybaum*, 296 N. Y. 201 (1947), the Court of Appeals reversed the Appellate Division because of the failure of the latter court to consider Rule 30 of the Rules of Civil Practice. Rule 30 was neither adverted to nor considered nor was there, in that case, any decision on the power of the court to direct commutation.

In short, the decision in the instant case resolves a question of local law and, as such, should be accepted as controlling by this Honorable Court. *American Railway Express Company* v. *Commonwealth of Kentucky*, 273 U. S. 269, 272-3 (1927).

Even if it be assumed, *arguendo*, that the Court of Appeals of New York erroneously decided the case, this does not raise a federal question under the Fourteenth Amendment (*Arrowsmith* v. *Harmoning*, 118 U. S. 194 (1886)). Petitioner has not been deprived of his right to an annuity under the trust. On the contrary, he is receiving what the law of New York allows to annuitants: He may, as a consequence of the decision by the Court of Appeals, receive less than the amount to which he claims

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[1] Parenthetically, it may be noted that the basic principle of this case was reversed by statute. (Surrogate's Court Act, Section 204, Real Property Law, Section 17(e)).

to be entitled.[8] But this does not constitute a violation of his rights under the Fourteenth Amendment. As this Court said in *Tracy* v. *Ginzberg*, 205 U. S. 170, 178 (1907):

> "The decision of a state court, involving nothing more than the ownership of property, with all parties in interest before it, cannot be regarded by the unsuccessful party as a deprivation of property without due process of law, simply because its effect is to deny his claim to own such property * * *."

Finally, what has been said in the portion of this brief under point "A" (p. 6, *supra*) concerning the petitioner's failure to appeal from the original order authorizing commutation without his consent, applies with equal force to petitioner's claim of a deprivation of rights under the Fourteenth Amendment occasioned by commutation without his consent (*Angel* v. *Bullington*, *supra*, p. 6).

Petitioner's claim of inequitable treatment attributable to "retroactive" commutation is specious not only because Rule 30 is not involved, but because he is prepared to accept the "retroactive" commutation offered by the minority opinion in the Court of Appeals. The minority, writing on May 24, 1957, proposed commutation as of September 19, 1954 (Pet. App. A, p. xiv), a "retroactive" period of two years and eight months.[9]

The Court of Appeals disposed of the claim of retroactivity in these succinct words:

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[8] If petitioner had died in 1942, for example, after his annuity had been commuted and paid in 1941, his estate would have kept the commuted value and not merely the single installment. Under such circumstances, the respondents could not have recovered the excess amount (Pet. App. A, p. IV).

[9] Though dates for commutation, other than date of death, were suggested first by the Referee (R. Vol. I, p. 161, f. 483) and there-

(*Continued on following page*)

"The commutation here was 'retroactive' in the sense only that intervening litigation postponed, but did not change as to amount, the payment of the commuted principal sum." (Pet. App. A. p. iv)

"The law has recompensed this annuitant for the delay, as it recompenses other litigants in other situations, by allowing him interest at the full legal rate." (Pet. App. A, p. iii)

Conclusion

The petition fails to suggest even the substance of a federal question (*Demorest* v. *City Bank Farmers Trust Co.*, 321 U. S. 36, 49 (1944), concurring opinion of Douglas, J.). There is no conflict of decisions to be resolved and no issue which calls for decision by this Honorable Court.

The petitioner's case is grounded on two illusory propositions: a statute which has no pertinency to the issues involved and a conception of vested rights which finds no support in the statutory or decisional law of the State of New York. Neither Article I, Section 10 of the Constitution nor the Fourteenth Amendment is properly invoked.

(*Continued from preceding page*)

after by the two minority judges of the Court of Appeals (Pet. App. A, p. ix), both dates were "retroactive" to a lesser degree but in the same sense that petitioner uses that term when he refers to the date of death. The Referee reported on April 14, 1953 (R. Vol. I, p. 93). He recommended commutation as of September 19, 1951 (R. Vol. I, p. 161). Thus his date was "retroactive" by one and one-half years. The Special Term agreed with his date (R. Vol. I, p. 80, f. 238), making its order of September 22, 1954 (R. Vol. I, p. 24, f. 70). So that its commutation date was "retroactive" by over two years. The two minority judges of the Court of Appeals writing on May 24, 1957 (3 N. Y. 2d 70; Pet. App. A, p. i), concluded that the date should be September 19, 1954 (Pet. App. A, p. ix). Their choice, therefore, was "retroactive" by two years and eight months.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAM T. GRIFFIN,
Attorney for Respondents,
John Wakefield Harris, Elizabeth Marshall Harris and Anthony J. Romagna, as Guardian ad Litem of Chantal L. M. F. d'Espinay, Infant.

WILLIAM T. GRIFFIN,
HERBERT BURSTEIN,
Of Counsel.

Dated, New York, October 28, 1957.